IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-898

LINDA MARIE SUTHERLAND; ROXANA MARGURITE SCHULTZ; and TONIA SUE PAPKE,

Appellants,

—against—

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

JURISDICTIONAL STATEMENT

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-against-

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OF THE STATE OF ILLINOIS

JURISDICTIONAL STATEMENT

Appellants appeal from a decision of the Supreme Court of Illinois denying a Petition for Leave to Appeal a Judgment of the Appellate Court of Illinois, Third District, affirming their criminal convictions. They submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The opinion of the Appellate Court of Illinois, Third District, entered following the remand from this Court, is reported at ___ Ill.App.3d ___, 329 N.E.2d 820, and is set forth in the Appendix, infra, at pp. 12a to 15a. A Petition for Leave to Appeal the Decision of the Appellate Court was denied by the Supreme Court of Illinois, without opinion, on September 25, 1975 (App., infra, p. 16a). The order of this Court, vacating the earlier decision of the court below and remanding for further consideration, is reported at 418 U.S. 907 and is set forth in the Appendix, infra, at p. 11a. The first opinion of the Appellate Court of Illinois, Third District, is reported at 9 Ill.App.3d 824, 292 N.E.2d 746, and is set forth in the Appendix, infra, at pp. 3a-8a. A petition for Leave to Appeal that decision was denied by the Supreme Court of Illinois, without opinion, on May 31, 1973 (App., infra, p. 2a). A separate civil action filed in the United States District Court for the Southern District of Illinois by Appellants against the prosecutor in this case, entitled Sutherland v. De Wulf, is reported at 323 F.Supp. 740.

Jurisdiction

The order of the Supreme Court of Illinois, denying the Petition for Leave to Appeal from the decision of the Appellate Court of Illinois, Third District, following remand, was entered on September 25, 1975.

A Notice of Appeal to this Court was filed on December 15, 1975 in the Circuit Court of Rock Island County, Illinois, on December 12, 1975 in the Appellate Court of Illinois, Third District, and on December 16, 1975 in the Supreme Court of Illinois.

The jurisdiction of this Court to review the decision by appeal is conferred by 28 U.S.C. Section 1257(2) and is sustained by the following decisions: Street v. New York, 394 U.S. 576 (1969); Cohen v. California, 403 U.S. 15 (1971); Spence v. Washington, 418 U.S. 405 (1974).

Statute Involved

Ill. Rev. Stat. 1969, ch. 56-1/4, §6 is printed in the Appendix, infra, at p. 1a.

Questions Presented

1. May the State of Illinois, consistent with the First and Fourteenth Amendments to the Constitution of the United States, make criminal the peaceful and symbolic communication of ideas, perceived by certain citizens as showing disrespect for the United States and its flag, through the medium of publicly burning a privately owned American flag in connection with concededly expressive action?

2. May such conduct be made criminal under a statute judicially declared to have been enacted for the purpose of preventing breaches of the peace, even though no actual evidence of an imminent danger of a breach of the peace is required in a case involving burning the flag or was actually shown in this case?

3. Is the Illinois statute proscribing such conduct impermissibly overbroad or vague in violation of the First and Fourteenth Amendments to the Constitution of the United States?

Statement of the Case

On May 5, 1970 at 4:00 p.m., the appellants, one 17 and two 19 years of age, planted an 8" x 10" American Flag into the lawn adjacent to the Federal Building located in Rock Island, Illinois. They then said prayers over the flag and commenced to burn it. The flag had belonged to appellant Sutherland's husband.

The substance of the prayers was excluded from evidence, but was explained in an offer of proof made out of the Jury's presence by appellant Papke:

> ... I tried to explain while we were burning the flag and I said that the flag was dirty on two levels; on the first level it was dirty because it was oily and greasy

> and dirty and had holes in it and it was no longer a fitting display of our country. It used to be a beautiful symbol but that particular flag was no longer beautiful and we were burning it because that was the proper way to get rid of dirty flags. And on the second level, symbolically it was dirty with blood from Southeast Asia and blood from the students that were killed at Kent State the day before. And other things the government had done. And I tried to, I wasn't trying to talk against the government, I said that the concepts that the flag are based upon are beautiful and that our flag is a beautiful symbol and our nation is based upon beautiful things but the country has strayed from the concepts set down in the Constitution that the flag is supposed to represent, and we must burn the flag and start again and go on our path again, return to the path. (R. 60).*

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* "R. ____" refers to the trial transcript; "RC ____" refers to the proceedings portion of the record.

Prior to burning the flag, the appellants had a conversation with an FBI agent working at the building who happened to be present; he tried to dissuade them from setting fire to the flag and advised them that it was a felony. (App., infra, p. 4a). After the fire was commenced, and while the agent was observing, a passing motorist stopped his vehicle, ran to the scene, and trampled on the flag to stamp out the fire (App., infra, p. 4a).

Thereafter, the appellants were charged with violating the second paragraph of section 1 of the Illinois Flag Act, Chapter 56-1/4, Section 6, of the Illinois Revised Statutes, 1969, to wit:

> Any person who publicly mutilates, defaces, defiles or defies, tramples or casts contempt upon, whether by words or act, any such flag, standard, color or ensign shall be punished by a fine of not less than $1,000 nor more than $5,000 or by imprisonment in the penitentiary from one to 5 years or both.

The appellants moved to dismiss the indictment on the ground that the statute violated the right to freedom of expression guaranteed by the First and Fourteenth Amendments to the Constitution (RC 19). In addition, the motion specifically urged the unconstitutionality of the statute on the grounds of overbreadth and vagueness (RC 19). The motion to dismiss was denied in all respects by the trial court (RC 54).

Following jury verdicts of guilty, the appellants were each sentenced to probation for one year, and to pay a fine of $100 plus court costs. Pursuant to Illinois procedure, they then filed a Motion in Arrest of Judgment, reasserting the unconstitutionality of the statute on the basis of all grounds urged in the initial Motion to Dismiss (RC 85, 91). This motion was also denied (RC 99, 129).

On appeal to the Illinois Appellate Court the same federal claims of unconstitutionality were presented, considered and rejected. In its opinion, the Appellate Court assumed, without explanation, that flag burning in a context where contempt is expressed, involves both "speech" and "non-speech" elements, so as to bring into play the four tests of constitutionality applied in United States v. O'Brien, 391 U.S. 367 (1968) with respect to legislation regulating conduct containing both those elements. The court held that the O'Brien tests were met. It identified the governmental interest being regulated by the statute as "the prevention of breaches of the peace and preservation of public order." 292 N.E.2d at 748 (App., infra, p. 5a). In connection with this analysis, the court indicated that in the context of this case, no evidence of an actual breach of the peace was required, remarking merely "...that the desecration of the flag by burning it in a public place is highly likely to cause a breach of the peace.... Violence might have resulted in the case before us if the defendants had not

been girls." 292 N.E.2d at 749 (App., infra at 7a).

In addition, the majority rejected the appellants' vagueness and overbreadth contentions.

In a specially concurring opinion, Justice Stouder rejected "the reasoning" of the majority, but concurred in the result, stating that on the basis of the divergent views expressed in Street v. New York, 394 U.S. 576 (1969), public flag burning was to be "a special case so far as application of first amendment liberties are concerned, ...because of the uniqueness and special nature of the circumstances." 292 N.E.2d at 749 (App., infra, p. 8a).

A Petition for Leave to Appeal, raising all these arguments, was thereafter denied by the Illinois Supreme Court.

Thereafter, the appellants filed a timely Jurisdictional Statement with this Court (No. 73-380). On July 8, 1974, the Court entered the following order:

> Judgment vacated and case remanded to the Appellate Court of Illinois, Third District, for further consideration in light of Spence v. Washington, 418 U.S. ____, 41 L.Ed.2d 842, 945 S.Ct. 2727 (1974) and Smith v. Goguen, 415 U.S. 566, 39 L.Ed.2d 605, 94 S.Ct. 1242 (1974). The Chief Justice, Mr. Justice White, Mr. Justice Blackmun,

> and Mr. Justice Rehnquist dissent and without further briefing and oral argument would affirm judgment. Sutherland v. Illinois, 418 U.S. 907 (1974), (App., infra, p. 11a).

In accordance with this Court's remand, and following briefing and argument, the Appellate Court of Illinois reconsidered its earlier decision and reaffirmed the appellants' convictions. ___ Ill. App. 3d ___, 329 N.E.2d 820 (3d Dist. 1974) (App., infra, pp. 12a to 15a). Over the appellants' contentions that Spence and Goguen undermined the reasoning of the earlier opinion, that Court, reiterating its previous analysis based upon United States v. O'Brien, held that Spence was inapposite because the record here supports "a valid governmental interest unrelated to expression - that is, the prevention of breaches of the peace and the preservation of public order." App., infra, p. 15a. This Court's decision in Spence was also deemed inapplicable because it involved different facts and a record which failed to demonstrate any risk of breach of the peace. The Appellate Court similarly held that Smith v. Goguen was distinguishable because this case involved an allegation of physical desecration. Finally, the Appellate Court held that the breach of the peace rationale for flag desecration statutes survived the decisions in Spence and Goguen. (App., infra, p. 15a).

On September 25, 1975, the Supreme Court of Illinois denied a petition for leave to appeal raising these constitutional issues.

THE QUESTIONS ARE SUBSTANTIAL

The relationship of the First Amendment to state laws regulating behavior toward and use of the American flag has engaged this Court's attention in plenary argument on four occasions during the past decade.[1/] In Street v. New York, 394 U.S. 576 (1969), this Court ruled that contemptuous or derisive language directed at the flag was en-

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1/ Prior to Street v. New York, 394 U.S. 576 (1969), this Court considered the First Amendment implications of compulsory flag salutes in West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) and Minersville School District v. Gobitis, 310 U.S. 586 (1940). The Court's earliest consideration of the constitutional implication of state statutes regulating flag usage appears to have taken place in Halter v. Nebraska, 205 U.S. 34 (1907), prior to the recognition of First Amendment constraints upon state statutes. The absence of 19th century precedent is not surprising, since the phenomenon of state regulated flag usage dates from the patriotic fervor surrounding the Spanish-American war. When Lee and Grant met at Appomattox Courthouse, they are said to have used the American flag as a tablecloth without seriously endangering the foundation of the Republic.

titled to First Amendment protection. In Smith v. Goguen, 415 U.S. 566 (1974), this Court ruled that state statutes regulating flag usage were obliged to conform to exacting standards of precision in order to provide adequate notice of the scope of their proscriptions and to minimize the danger of arbitrary and subjective enforcement. In Spence v. Washington, 418 U.S. 405 (1974), this Court ruled that affixing a peace symbol to an American flag was constitutionally protected expressive activity. See also, Cahn v. Long Island Moratorium Committee, 418 U.S. 906 (1974). However, in Radich v. New York, 401 U.S. 531 (1971), this Court divided evenly on the scope of the constitutional protection available to an individual who mutilates or otherwise destroys an American flag in connection with expressive activity.[2/]

This case raises, once again, the issue which perplexed the Court in Radich, which was expressly pretermitted in Spence, which was virtually ignored on the remand below, and which remains a serious, unanswered, question: Under what circumstances, if any, may a state forbid the mutilation or destruction of a privately owned American flag in connection with concededly expressive

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2/ Radich's conviction was ultimately overturned on habeas corpus in United States ex rel Radich v. Criminal Court, 385 F.Supp. 165 (S.D.N.Y. 1974).

action? Appellants suggest that, unless we adopt a view of the State and its trappings wholly at variance with our heritage, Americans must be free to use their flag as an aid in the dissemination of ideas and that Illinois' "undifferentiated fear" of potential hostile response to appellants' expression cannot justify the conviction at issue herein. As was said in Barnette: "The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own." 319 U.S. at 641.

In addition, whether or not appellants' expression is ultimately afforded First Amendment protection, appellants' convictions must be reversed because the Illinois statute at issue herein fails to meet the strict procedural standards required by this Court of any state criminal statute purporting to regulate expressive activity.

I. APPELLANTS HAVE BEEN CONVICTED FOR ENGAGING IN CONSTITUTIONALLY PROTECTED EXPRESSION.

A. The Expressive Nature of Appellants' Activity

No serious dispute exists concerning the expressive nature of appellants' activity. In the most graphic terms of which they were capable, appellants sought to express their anguish over the loss of life at Kent

State.[3] As this Court has repeatedly held, the fact that appellants chose to utilize the flag as a non-verbal aid in the communication of their ideas does not strip their activity of its essentially communicative character. E.g., Stromberg v. California, 283 U.S. 359 (1931); Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); Spence v. Washington, 418 U.S. 405 (1974).[4] Nor does the arguably questionable taste and judgment of the appellants, in selecting a mode of communication likely to be offensive to some viewers, strip their activity of its communicative character. E.g., Cohen v. California, 403 U.S. 15 (1971); Erznoznik v. City of Jacksonville, 45 L.Ed.2d 125 (1975). Given its essentially communicative character, appellants' expressive activity may be outlawed only if necessary to achieve a critical

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3/ The similarity of motivation between appellants herein and the appellant in Spence v. Washington, supra, is striking. Had appellants placed peace symbols on their flag instead of solemnly burning it, Spence would clearly require a reversal of their conviction.

4/ This case is, thus, distinguishable from situations in which flag statutes are applied against activity which is not intended to convey or dramatize an idea. E.g., Cowgill v. California, 396 U.S. 371 (1970).

government objective wholly unrelated to the suppression of expression. E.g., United States v. O'Brien,391 U.S. 367 (1968).

B. The State Objectives Allegedly Advanced By Suppressing Appellants' Expression

(1) Protecting the Sensibilities of Passersby

In Erznoznik v. City of Jacksonville, supra, this Court reaffirmed its consistent refusal to uphold the suppression of expression merely because a segment of the population might be offended by its content. See also, Cohen v. California, supra; Street v. New York, supra. Thus, merely because a sizeable number of passersby might find appellants' expressive activity offensive and disturbing cannot found a basis for its suppression. Spence v. Washington, supra.

(2) Preventing Breaches of the Peace

It is, of course, a truism that a state has the right - and the duty - to maintain public order. Thus, when a personal insult is hurled directly at an individual under circumstances likely to result in physical retaliation, this Court has recognized a narrow category of cases in which such "fighing words" may be prohibited. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). However, as Mr. Justice Harlan noted in

Cohen, in order to fall within the "fighting words" exception, an epithet must be directed "in a personally provocative fashion" at a particular individual. Cohen v. California, supra, 403 U.S. at 20. See also, Cantwell v. Connecticut, 310 U.S. 296, 309-310 (1940). No case has ever suggested that pungent political expression directed to the general public which is unpopular or otherwise disfavored may be suppressed under the rubric of "fighting words." Indeed, in an unbroken series of cases, this Court has refused to permit the fear of retaliation by a "hypothetical coterie of the violent and lawless" to justify the suppression of unpopular expression directed to the general public. Cohen v. California, supra, 403 U.S. at 23.5/

5/ This Court's consistent refusal to permit fear of hostile reaction to justify suppression of expressive activity may be traced through Cantwell v. Connecticut, supra; Terminiello v. Chicago, 337 U.S. 1 (1949); Edwards v. South Carolina,372 U.S. 229 (1963)(presence of known white troublemakers in hostile crowd of onlookers no basis for breaking up meetings); Cox v. Louisiana, 379 U.S. 536 (1965)("mutterings," "grumblings" and "rumblings" in hostile crowd of white onlookers no basis for dispersing demonstrators); Gregory v. City of Chicago, 394 U.S. 111 (1969) (fear of impending civil disorder insufficient unless demonstrated factually); Street v. New York, supra; and Cohen v. California, supra.

Of course, as Feiner v. New York, 340 U.S. 315 (1951) recognizes, even classic First Amendment activity may be halted upon a showing of an actual imminent danger of hostile retaliation which the police are unable to control. However, no such imminent danger was even alleged in this case. Indeed, the presence of an FBI Agent on the scene at all stages of the proceedings negates any serious contention that Feiner standards were complied with below.

Instead, Illinois argues that it is entitled to hypothesize in advance that hostile reaction might develop whenever a flag is contemptuously treated, and to impose a broad, prophylactic ban on such activity. However, as this Court has repeatedly held, a prohibition on expressive activity may not be premised upon an abstract and hypothetical prediction of hostile reaction; rather, if permitted at all, a "hecklers veto" must be premised on a closely scrutinized factual predicate. Cf., Feiner v. New York, supra. In the absence of facts indicating that appellants' expression actually created an imminent danger of a breach of the peace, Illinois may not seek to impose sanctions upon them. 6/ Under similar circumstances,

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6/ There is, in addition, a serious question whether the predictive aspect of the Illinois statute is a rational one. In the numerous reported cases involving flag desecration

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Iowa and New York have required an actual showing of imminent danger of breach of the peace before invoking their flag desecration statutes. E.g., State v. Kool, 212 N.W.2d 518 (1973); People v. Keough, 31 NY 2d 281, 338 N.Y.S. 2d 618 (1972). See also, United States ex rel Radich v. Criminal Court, 385 F.Supp. 165 (S.D.N.Y. 1974) and the cases collected in Radich, supra, at 180 n. 60. Illinois, consistent with the strictures of the First Amendment, may do no less. See Thompson v. Louisville, 362 U.S. 199 (1960); Vachon v. New Hampshire, 414 U.S. 478 (1974).

(3) Preserving the Integrity of Our National Symbol

Illinois has not sought to defend its

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during the past tumultuous decade, no instance of imminent danger of a breach of the peace has been documented. It is demeaning to suggest that a people capable of forging the freest society the world has known are incapable of restraining themselves from violently attacking three teenaged girls. We are not a nation of vigilantes, and Illinois has no right to limit expression within its borders on the assumption that we cannot be trusted to refrain from violence. Moreover, if retaliatory violence is a predictable result of a given form of expression, the duty of the state is to protect the speaker and not to reward the mob. Cf., Cooper v. Aaron, 358 U.S. 1 (1958).

statute as one designed to protect the integrity of our national symbol, and it is, thus, questionable whether such an interest may be considered by this Court as a basis for sustaining the appellants' convictions. Even if such an interest is properly before the Court, it cannot justify the Illinois convictions. In Spence v. Washington, 418 U.S. 405 (1974), this Court ruled that an interest in preserving the integrity of our national symbol could not justify a conviction for affixing a peace symbol to the flag. Although the Court did not reach the issue of whether such an interest might uphold a conviction for physical mutilation, it is difficult to articulate why the integrity of a symbol would be less affected by displaying it in altered form (as in Spence) than by physically destroying it. Indeed, the act of destroying a privately owned flag is probably a lesser interference with the symbol than continuous public display of an altered flag.

Since appellants were engaged in communicative activity, and since, on the facts of this case, their activity did not threaten an imminent danger of a breach of the peace and did not impinge upon any other legitimate governmental interest, their convictions may not be sustained.

II. APPELLANTS HAVE BEEN CONVICTED UNDER AN UNCONSTITUTIONAL STATUTE.

It is appellants' primary contention that they were engaged in protected First Amendment activity. However, this Court has ruled that whether or not appellants were engaged in protected activity, their convictions must be reversed if Illinois purported to prosecute them under a statute which fails to satisfy strict standards of procedural regularity. Thus, if the Illinois flag desecration statute fails to carry out its task with sufficient precision and sophistication, and if the Illinois courts have not supplied a saving gloss, appellants' convictions must be reversed, without reaching the issue of whether their activities were, in fact, protected by the First Amendment. The Illinois statute at issue herein is seriously deficient in at least three critical areas.

A. Illinois Outlaws Variant Flag Usage Expressing Negative Sentiments While Permitting Variant Use of the Flag to Express Positive Views.

This Court has ruled that statutes regulating expression may not discriminate on the basis of the contents of the message involved. E.g., Police Dep't. of Chicago v. Mosely, 408 U.S. 92 (1972). In Schacht v. United States, 398 U.S. 58 (1970), this Court invalidated a ban on the use of military uniforms in theatrical productions because the ban applied selectively to outlaw only negative expression about the armed forces. In Illinois the flag may be used as an aid in the expression

of patriotic ideas, but it may not be used to express a message of contempt or anguish. Indeed, the 1968 amendment which added the statute's present harsh penalties was enacted "...in response to the acts of flag mutilation, burning and desecration being perpetrated by civil rights advocates and youthful protestors of the Vietnam War...." People v. Lindsay, 51 Ill.2d 399, 282 N.E. 2d 431, 434 (1972). Such a flagrant discrimination in access to the flag as an aid in communication is precisely the type of content-related discrimination which this Court has repeatedly condemned.

B. The Illinois Statute is Unconstitutionally Overbroad.[7/]

Illinois has not purported merely to outlaw flag burning. Instead, the Illinois statute casts a dragnet of words and purports to prohibit activity which "defiles or defies ...or casts contempt upon" the American flag. As this Court noted in Smith v. Goguen, supra,

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7/ Given the expressive, but non-verbal, nature of appellants' activity, it is unclear whether the "substantial" overbreadth test of Broadrick v. Oklahoma, 413 U.S. 601 (1973) or the "pure" overbreadth test of Gooding v. Wilson, 405 U.S. 518 (1972) is applicable. From an outcome determinative standpoint, however, the issue is academic since the Illinois statute violates even the Broadrick standard.

the use of broad and amorphous language in a statute regulating flag usage renders it virtually impossible to learn the precise scope of its proscription. At the least, however, such language appears to sweep within its ambit broad categories of clearly protected activity, such as contemptuous gestures and defiant behavior. This Court has systematically invalidated convictions under statutes which were "susceptible of application to speech, although vulgar or offensive, that is protected by the First Amendments," [8/] without regard to whether the actual language used was entitled to First Amendment protection. E.g., Lewis v. City of New Orleans, 408 U.S. 913 (1972) and 415 U.S. 130 (1974). See also, Erznoznik v. City of Jacksonville, supra and Bigelow v. Virginia, 44 L.Ed.2d 600 (1975) for classic applications of the overbreadth dostrine. Since the Illinois courts have not provided a narrowing construction which would limit the range of application and since the Illinois statute is obviously rife with potential unconstitutional applications, appellants' convictions must be reversed.

Indeed, in vacating the convictions herein and remanding them to the Illinois courts for reconsideration in light of Spence and Goguen, it was, apparently, the hope of this Court

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8/ Lewis v. City of New Orleans, 415 U.S. 130, 134 (1974).

that a narrowing construction might avoid the obvious vagueness and overbreadth problems inherent in the statute. 418 U.S. 906. Unfortunately, the Illinois courts have declined to narrow the statute, forcing this Court into a posture similar to its role in Lewis v. City of New Orleans, 415 U.S. 130 (1974).[9/] In the absence of a

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9/ The failure of the Supreme Court of Illinois to even attempt a narrowing construction on remand is in marked contrast to the Iowa court's action in Farrell v. Iowa, 418 U.S. 907 (1974), on remand, 223 N.W. 2d 270 (1974), appeal dismissed 95 S.Ct. 2410 (1975). In Farrell, subsequent to the Farrell conviction, the Iowa Supreme Court, in State v. Kool, 212 NW 2d 518 (1973), dramatically narrowed Iowa's statute by requiring a factual demonstration of an imminent danger of a breach of the peace prior to conviction. On remand in Farrell, itself, the Iowa Supreme Court searched the record and discovered what it considered sufficient evidence. Whether such evidence was sufficient to satisfy even the requirement of Thompson v. Louisville, 362 U.S. 199 (1960) is debatable. However, an appeal, marred by lack of timeliness, was dismissed by this Court. 95 S.Ct. 2410 (1975).

It should also be noted that while the remand in Farrell was only for reconsideration in light of Spence, this Court's remand here requested the Illinois courts to reconsider their actions and their statute in light of both Spence and Goguen. Yet the courts below gave only perfunctory consideration to the issues raised by either case.

narrowing Illinois construction, this Court must confront the Illinois statute as written and, under either a "substantial" or a "pure" overbreadth analysis, invalidate it.

C. The Illinois Statute is Void For Vagueness.

In Smith v. Goguen, supra, this Court noted the virtual impossibility of ascertaining precisely what "contemptuous" flag usage means in modern society. The Illinois statute provides even less guidance than did the Massachusetts statute. Moreover, although the Smith opinion is couched primarily in terms of notice to a prospective defendant, as Mr. Justice White noted, no serious notice problem existed since wearing a flag on one's rump seemed to fall rather clearly within the core meaning of contemptuous conduct. However, the imprecision inherent in both the Massachusetts and Illinois statute is unacceptable for reasons unrelated to notice. The vagueness inherent in such statutes virtually assures that they will be subject to arbitrary and highly subjective administration.

Indeed, the Illinois statute is rendered even more capable of abuse by the purely subjective requirement of intent. Thus, the person who observed the burning of the flag and came over to "trample" on the flag to put out the fire was, of course, not prosecuted, although the literal terms of the statute were violated. Similarly, the court below, in justifying the trial court's refusal to instruct on the Federal Flag Etiquette Statute,

36 U.S.C. Section 176(j), which advises that flags in poor condition should be destroyed "preferably by burning," stated that "...the record leaves no doubt that the defendants' purpose was to protest against current events, not to dispose of a flag in poor condition in accordance with prescribed etiquette." (App. infra, p. 7a). Moreover, the words of the statute and the breach of the peace rationale invoked to sustain it, see People v. Lindsay, supra, make clear that it is not what one does to a flag which is controlling, but rather the attitude with which one does it. The words "defiles," "defies," and "casts contempt upon," as well as the title of the act, "Desecration ..." carry an unmistakable meaning that actions with respect to the flag must be accompanied by an attitude perceived as disrespectful or contemptuous. That additional requirement is impermissible. See Smith v. Goguen, supra, 415 U.S. at 587-90 (concurring opinion of Mr. Justice White). And, as a consequence, a police officer and a jury are left without meaningful standards to guide them in enforcing the Illinois statute. The absence of such standards, and the resulting capacity for abuse, is precisely the vice which the vagueness doctrine is designed to avoid. E.g., Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

CONCLUSION

For the reasons set forth above, jurisdiction should be noted. 10/

Respectfully submitted,

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10/ The recent decision by this Court in Hicks v. Miranda, 45 L.Ed.2d 223 (1975), that dispositions of cases within the obligatory jurisdiction of this Court carry stare decisis impact, renders it particularly important that this case be decided in a plenary opinion. Given the serious doctrinal issues raised herein and left unresolved by Radich v. New York, 401 U.S. 531 (1971), it would be particularly inappropriate to create a national precedent by the opaque and unsatisfactory method of summary disposition.

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APPENDIX

APPENDIX

Statute Involved

Ill. Rev. Stat. 1969, ch. 56¼, §6:

DESECRATION, MUTILATION, OR IMPROPER USE—PENALTY.

Any person who (a) for exhibition or display, places or causes to be placed any word, figure, mark, picture, design, drawing, or any advertisement of any nature, upon any flag, standard, color or ensign of the United States or State flag of this State or ensign, (b) exposes or causes to be exposed to public view any such flag, standard, color or ensign, upon which has been printed, painted or otherwise placed, or to which has been attached, appended, affixed, or annexed, any word, figure, mark, picture, design or drawing or any advertisement of any nature, or (c) exposes to public view, manufactures, sells, exposes for sale, gives away, or has in possession for sale or to give away or for use for any purpose, any article or substance, being an article of merchandise, or a receptacle of merchandise or article or thing for carrying or transporting merchandise upon which has been printed, painted, attached, or otherwise placed a representation of any such flag, standard, color, or ensign, to advertise, call attention to, decorate, mark or distinguish the article or substance on which so placed, shall be punished by a fine of not less than $10 nor more than $100 and costs, or by imprisonment for not more than 30 days in a penal institution other than the penitentiary, or both.

Any person who publicly mutilates, defaces, defiles or defies, tramples or casts contempt upon, whether by words or act, any such flag, standard, color or ensign shall be punished by a fine of not less than $1,000 nor more than $5,000 or by imprisonment in the penitentiary from one to 5 years or both.

[Note: In this case, prosecution was under the second paragraph of the foregoing statute.]

Memorandum of Denial of Petition for Leave to Appeal by Illinois Supreme Court

[Emblem]

STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
SPRINGFIELD
62706

JUSTIN TAFT
CLERK

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No. 45779—People State of Illinois, respondent, vs. Linda Marie Sutherland, et al., petitioners. Leave to appeal, Appellate Court, Third District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ JUSTIN TAFT
Clerk of the Supreme Court

Opinion of Appellate Court of Illinois, Third District Filed February 9, 1973

No. 72-2

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

LINDA MARIE SUTHERLAND *et al.,*
Defendants-Appellants.

DIXON, Justice.

The defendants, Linda Marie Sutherland, Roxana Margurite Schultz, and Tonia Sue Papke, were charged in a joint indictment with the crime of publicly mutilating a flag of the United States in violation of the second paragraph of section 1 of the Illinois Flag Act (Ill.Rev.Stat. 1969, ch. 56¼, sec. 6, par. 2). The defendants were all found guilty by a jury, each of them was sentenced by the Circuit Court of Rock Island County to pay a fine of $100 plus costs of suit, and each was placed on probation for one year. All the defendants have appealed.

The second paragraph of section 1 of the Illinois Flag Act reads as follows: "Any person who publicly mutilates, defaces, defiles or defies, tramples or casts contempt upon, whether by words or act, any such flag, standard, color or ensign [of the United States or this State] shall be punished by a fine of not less than $1,000 nor more than $5,000

or by imprisonment in the penitentiary from one to 5 years or both."

The defendants contend that this statute violates their right to freedom of speech guaranteed by the Federal and Illinois constitutions. They argue that its function is to punish disrespectful thought expressed by conduct, and that Illinois has no sufficient interest to justify a statute of this kind. They say also that the statute is void for vagueness or for overbreadth, and that errors were committed in the course of the trial.

The evidence established that the defendants had planted an American flag in the lawn adjacent to the Federal Building in Rock Island, Illinois, had said prayers over it, and had then set it on fire to protest against the invasion of Cambodia and the death of the four students at Kent State. An F.B.I. agent who had happened to be present had advised them not to set fire to the flag and had warned them that they would be committing a felony. After the fire had been started, a passing motorist had stopped his car in the street, double-parked, had run to the scene, and had stamped on the flag to put the fire out.

After the defendants were indicted, they commenced an action in a Federal district court to have this paragraph of the Illinois Flag Act declared void for abridging free speech or for overbreadth, and to have the Rock Island County state's attorney enjoined from prosecuting them under this statute. In that case, Sutherland v. DeWulf, 323 F. Supp. 740 (D.C.), the three-judge court, speaking through Mr. Justice Morgan, answered the arguments of these defendants, upheld the Illinois statute, and denied their request for an injunction. The same free-speech and overbreadth arguments are presented to us now.

What the statute proscribes is not pure speech but conduct which may in some cases amount to symbolic speech. The United States Supreme Court has held, in United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct," a governmental regulation of the nonspeech element which has the incidental effect of limiting First Amendment freedoms is justified "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." It appears to us that the tests laid down in *O'Brien* for statutes which may restrict symbolic speech are met here.

It is not disputed that the Illinois legislature has a constitutional source of power to enact a statute on the misuse of flags. This has been clear since 1907. (Halter v. Nebraska, 205 U.S. 34, 27 S.Ct. 419, 51 L.Ed. 696 (use of the flag for advertising prohibited).) No question as to the scope of a granted or delegated power is raised by a State statute (see Sutherland v. DeWulf, (D.C.) 323 F.Supp. 740, 744 n. 2), and the Federal government has not pre-empted State flag-burning statutes. Street v. New York, 394 U.S. 576, 598, 89 S.Ct. 1354, 22 L.Ed.2d 572 (dissenting opinion).

The Illinois statute was enacted, the Illinois Supreme Court has stated, for the prevention of breaches of the peace and preservation of public order. (People v. Lindsay, 51 Ill.2d 399, 282 N.E.2d 43; People v. Von Rosen, 13 Ill.2d 68, 147 N.E.2d 327.) This is plainly an important and substantial governmental interest.

The State's interest in preventing breaches of the peace is unrelated to the suppression of free expression, we believe, because the maintenance of public order does not call for inhibiting communication except incidentally and minimally. The challenged statute through which this governmental interest is effectuated, though it may restrict symbolic speech, does not significantly abridge free expression because many other avenues of communicating dissent and dissatisfaction remain. (Sutherland v. DeWulf, (D.C.) 323 F.Supp. 740, 745-746) Analogously, the State's interest in maintaining order permits curtailing even "pure speech" incidentally and minimally, by prohibiting the use of language which is inherently likely to provoke immediate and violent reaction. Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031; *cf.* Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284.

The incidental restriction on alleged First Amendment freedoms does not appear to us to be any greater than is essential to prevent breaches of the peace. Communication in one narrow way, by public desecration of the flag, is forbidden because a breach of the peace is considered likely to follow. Obviously, prohibiting flag burning restricts First Amendment freedoms no more than prohibiting draft-card burning as in *O'Brien*.

It appears that the four O'Brien tests are met, and that the statute accordingly does not violate constitutional rights of freedom of expression, but is validated by the State's fundamental interest in securing public order.

The defendants argue that the statute is void for vagueness or overbreadth. We think the statute gives reasonable notice to persons of ordinary intelligence of the kind of conduct that is prohibited. (Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222, 227; United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989; City of Chicago v. Lawrence, 42 Ill.2d 461, 464, 248 N.E.2d 71.) We think also that the statute goes no further than a State may go, (see Grayned v. City of Rockford, 408 U.S. 104, 92 S.Ct. 2294, 2305, 33 L.Ed.2d 222, 234,) its reach having been restricted by the Illinois Supreme Court to situations where there is an immediate threat to public order, (People v. Lindsay, 51 Ill.2d 399, 406, 282 N.E.2d 431,) and the *O'Brien* tests having been met. It therefore is not void on either of these two grounds.

The defendants also argue that the likelihood of a breach of the peace was not established. We disagree. It appears to us that the desecration of the flag by burning it in a public place is highly likely to cause a breach of the peace. See Sutherland v. DeWulf, (D.C.) 323 F.Supp. 740, 745. It was long ago observed by the United States Supreme Court, in Halter v. Nebraska, 205 U.S. 34, 41, 27 S.Ct. 419, 51 L.Ed. 696, that indignities put upon a flag have sometimes been punished on the spot. Violence might have resulted in the case before us if the defendants had not been girls.

The defendants complain that proof of the substance of the prayers to show their intent was excluded. However, their intent was shown by other testimony which was admitted, so the exclusion was harmless. (Braswell v. New York, C. & St. L. R. R., 60 Ill.App.2d 120, 132, 208 N.E.2d 358.) They complain of the trial court's refusal to instruct on the Federal Flag Etiquette Statute, but we consider it inapplicable. The record leaves no doubt that the defendants' purpose was to protest against current events, not to dispose of a flag in poor condition in accordance with prescribed etiquette. They also complain that no instruction with respect to breach of the peace was given, but they did not tender any such instruction and so cannot be heard

to complain of the omission now. Bridges v. Ford Motor Co., 104 Ill.App.2d 26, 36-37, 243 N.E.2d 559.

We find that the second paragraph of section 1 of the Illinois Flag Act is valid, that the defendants were proved guilty, and that no reversible error was committed. Accordingly the judgment of the Circuit Court of Rock Island County is affirmed.

Judgment affirmed.

STOUDER, P.J., and ALLOY, J., concur.

STOUDER, Presiding Justice (specially concurring).

I concur with the result reached by the majority of the court but I do not agree with the reasoning supporting such result. After considering the several opinions in Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572, I conclude that public flag burning to convey or dramatize protest against social conditions is a special case so far as application of first amendment liberties are concerned. The divergent views expressed in such opinions reveals a basic inclination to hold the first amendment of the Federal constitution inapplicable because of the uniqueness and special nature of the circumstances.

Notice of Appeal Filed With the Supreme Court of Illinois, the Appellate Court of Illinois, Third District and the Circuit Court of Rock Island County, Illinois on August 28, 1973

IN THE

SUPREME COURT OF ILLINOIS

Appellate Court No. 72-2

Rock Island County Circuit Court No. 70Y393

LINDA MARIE SUTHERLAND; ROXANA MARGURITE SCHULTZ; and TONIA SUE PAPKE,

Appellants,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

No. 45779

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Linda Marie Sutherland, Roxana Margurite Schultz and Tonia Sue Papke appeal to the Supreme Court of the United States from the final order of the Supreme Court of Illinois denying their Petition for Leave to Appeal the Decision of the Appellate Court of Illinois, Third District, which decision affirmed

judgments of conviction entered by the Circuit Court of Rock Island County, Illinois in Case No. 70 Y 393. The Illinois Supreme Court denied Appellants' Petition for Leave to Appeal on May 31, 1973.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

LINDA MARIE SUTHERLAND
ROXANA MARGURITE SCHULTZ
and TONIA SUE PAPKE,

Appellants

By: /s/ PETER DENGER
507 Cleaveland Bldg.
Rock Island, Ill. 61201
(309) 786-1083

and

THOMAS KELLY
200 Walgreen Bldg.
Davenport, Iowa 52801,

Their Attorneys

JUDGMENT OF THE
UNITED STATES SUPREME COURT

July 8, 1974

No. 73-380. Linda Marie Sutherland et al., appellants v Illinois.

Appeal from the Appellate Court of Illinois, Third District. Judgment vacated and case remanded to the Appellate Court of Illinois, Third District, for further consideration in light of Spence v Washington, 418 U.S. 405, 41 L.Ed. 2d 842, 94 S.Ct. 2727 (1974) and Smith v Goguen, 415 US 566, 39 L Ed 2d 605, 93 S Ct 1242 (1974). The Chief Justice, Mr. Justice White, Mr. Justice Blackmun, and Mr. Justice Rehnquist dissent and without further briefing and oral argument would affirm judgment.

DECISION OF THE APPELLATE COURT OF ILLINOIS, THIRD JUDICIAL DISTRICT, ON REMAND

OPINION OF THE APPELLATE COURT OF ILLINOIS, THIRD DISTRICT

Mr. Justice Stouder delivered the opinion of the court:

The defendants, Linda Marie Sutherland, Roxana Margurite Schultz, and Tonia Sue Papke, were charged in a joint indictment with the crime of publicly mutilating a flag of the United States in violation of the second paragraph of section 1 of the Illinois Flag Act (Ill.Rev.Stat. 1969, ch.56-1/4, sec.6, par.2). In a trial before a jury, all defendants were found guilty.

In an earlier opinion filed on February 9, 1973, this court affirmed the judgments of conviction. (People v. Sutherland, 9 Ill.App.3d 824, 292 N.E.2d 746). The Illinois Supreme Court denied leave to appeal, without opinion, on May 31, 1973.

Thereafter, the defendants appealed to the United States Supreme Court. On July 8, 1974, that Court vacated the judgment and the cause was remanded for further consideration in light of Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 41

L.Ed.2d 842 and Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605. Sutherland v. Illinois, ____U.S.____, 94 S.Ct. 3198, 41 L.Ed.2d 1154 (mem.).

The cause is now before this court pursuant to the directions of the United States Supreme Court. This cause was redocketed, additional briefs have been filed and oral arguments were heard in order to aid the court in reconsideration of the issues.

The facts are set out in our earlier opinion and need not be restated here.

In our earlier opinion, we applied the four-step analysis of United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, a case which involved the burning of a draft card. In that case the United States Supreme Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct," a governmental regulation of a non-speech element which has the incidental effect of limiting first amendment freedoms is justified "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

The defendants argue that section 1 of the Illinois Flag Act is unconstitutional as applied because the act of burning a flag is protected symbolic speech within the first amendment. They contend that burning a flag, unlike a draft card, is a purely symbolic act containing no nonspeech elements. Therefore, the O'Brien analysis does not apply. The defendants also rely on Spence, a flag case, in which the United States Supreme Court found the O'Brien treatment inapplicable.

The defendants attempt to argue that conduct involving the burning of a flag constitutes speech. This argument fails to account for the view of the United States Supreme Court, expressed in O'Brien and reiterated in Spence, wherein the Court rejected the proposition that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842; United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672.

In Spence, the defendant affixed a peace symbol fashioned of removable tape to a flag which he owned and hung it from the window of his apartment. The record failed to demonstrate any risk of breach of the peace.

The United States Supreme Court did not adopt the O'Brien approach because no

governmental interest unrelated to expression had been advanced or could be supported on the record. The record in the instant appeal, unlike that in Spence, does support a valid governmental interest unrelated to expression - that is, the prevention of breaches of the peace and the preservation of public order. People v. Lindasy, 51 Ill. 2d 399, 282 N.E.2d 431; People v. Von Rosen, 13 Ill. 2d 68, 147 N.E.2d 327.

We also find that Smith v. Goguen does not require a different result. In Smith, the Supreme Court held only that the "treats contemptuously" portion of a flag-misuse statute was void for vagueness under the due process clause of the Fourteenth Amendment because the statutory provision did not adequately give notice of what acts were criminal and did not establish minimal guidelines to govern law enforcement officers and juries. No allegation of physical desecration was made there as in the case at bar. More important, however, the court did not hold that a legislature may not define "with substantial specifity what constitutes forbidden treatment of United States flage."

Finally, Spence and Goguen did not reject the breach of the peace rationale as a basis for the state's interest in enacting flag desecration statutes. We find therefore that neither Spence nor Goguen requires a reversal of the judgments of conviction.

Judgment affirmed.
Alloy, J. and Barry, J. concur.

ORDER OF THE SUPREME
COURT OF ILLINOIS, DENYING
LEAVE TO APPEAL

[SEAL]

State of Illinois
Office of
CLERK OF THE SUPREME COURT
Springfield
62706

Clell L. Woods
Clerk

Telephone
Area Code 217
782-2035

September 25, 1975

Mr. Stuart R. Lefstein
Attorney at Law
402 First National Bank Bldg.
Rock Island, Illinois 61201

No. 47751 - People State of Illinois,
respondent, vs. Linda Marie
Sutherland, et al., petitioners.
Leave to appeal, Appellate Court,
Third District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled case.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

Copy of Notice of Appeal filed with the Supreme Court of Illinois, the Appellate Court of Illinois, Third District and the Circuit Court of Rock Island County, Illinois on December 16, 12 and 15, respectively.

No. 47751

In The
SUPREME COURT OF ILLINOIS

Linda Marie Sutherland, Roxana Margurite Schultz, Tonia Sue Papke, Appellants, v. People of the State of Illinois, Appellee.	:	Appellate Court No. 74-352 Rock Island County Circuit Court No. 70Y393

[Filed December 16, 1975
Clell L. Woods, Clerk]

Notice of Appeal to The
Supreme Court of
the United States

Notice is hereby given that Linda Marie Sutherland, Roxana Margurite Schultz and Tonia Sue Papke appeal to the Supreme Court

of the United States from the final order of the Supreme Court of Illinois denying their most recent Petition for Leave to Appeal the decision of the Appellate Court of Illinos, Third District, which decision reaffirmed judgments of conviction entered by the Circuit Court of Rock Island County, Illinois, in case number 70Y393, following a remand for further consideration from the Supreme Court of the United States. The Illinois Supreme Court denied Appellants' Petition for Leave to Appeal on September 25, 1975.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Linda Marie Sutherland
Roxana Margurite Schultz
and Tonia Sue Papke,
Appellants
By: /s/ Peter Denger
For 507 Cleaveland Bldg.
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Tel: 309/786-1083

and

Thomas Kelly
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Davenport, IA 52801
Tel: 319/324-3259

Their Attorneys

No. 47751
In The
SUPREME COURT OF ILLINOIS

Linda Marie Sutherland, Roxana Margurite Schultz, Tonia Sue Papke, Appellants,	:	Appellate Court No. 74-352
v.	:	Rock Island County Circuit Court No. 70Y-393
People of the State of Illinois, Appellee.	:	

[Filed December 16, 1975
Clell L. Woods, Clerk]

Proof of Service of Notice of Appeal

The undersigned, one of the attorneys for the above-named appellants, hereby certifies that he has served a copy of the Notice of Appeal to the Supreme Court of the United States, which notice has been filed contemporaneously with this Proof of Service in all of the above named courts, on the party entitled to service of such documents, namely, the People of the State of Illinois. Service was made upon said parties by depositing copies of the aforesaid documents in a United States mailbox with first-class postage prepaid, addressed to counsel of record at his post office address. Counsel of record is the State's Attorney of Rock Island County, Illinois, namely David DeDoncker, Rock Island County

Courthouse, Rock Island, Illinois 61201. A copy of said notice was served in like manner on William Soctt, Attorney General of the State of Illinois, Springfield, Illinois 62701. Date of mailing was December 12, 1975.

Linda Marie Sutherland,
Roxana Margurite Schultz,
and Tonia Sue Papke,

Appellants

By: /s/ Peter Denger
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